

2

Supreme Court, U.S.  
**FILED**

FEB 18 1988

No. 87-1186

In The  
**Supreme Court of the United States**  
October Term, 1987

JOSEPH F. SPANIOLO, JR.  
CLERK

HORRIE DUNCAN, individually and in his official capacity as CARROLL COUNTY COMMISSIONER; PATTI BROWN, A. G. AULT, CAROL MARTIN, JAMES GAMBLE and TOMMY GREER, individually and in their official capacities as members of the CARROLL COUNTY ELECTION BOARD,

*Petitioners,*

v.

CITY OF CARROLLTON BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, VOTER EDUCATION PROJECT CITY OF CARROLLTON, MARVIN WALKER, ROBERT SPRINGER, JAMES WYATT and JEFF LONG,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONER'S  
PETITION FOR A WRIT OF CERTIORARI

WAYNE B. KENDALL  
*Counsel of Record  
for Respondents*

Please serve:

WAYNE B. KENDALL  
KENDALL & KENDALL  
Attorneys at Law  
134 Peachtree Street  
Suite 1105  
Atlanta, Georgia 30303  
(404) 584-7416

23pp

## QUESTIONS PRESENTED FOR REVIEW

(1) Whether there is a conflict between the opinion below, 829 F.2d 1547 (11th Cir. 1987), and the opinion of the Court of Appeals for the Second Circuit in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985) as to the application of the Voting Rights Act, 42 U.S.C. Sec. 1973, to single-member electoral offices?

(2) Whether the Eleventh Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings, in deciding the case below, as to call for an exercise of this Court's power of supervision?

(3) Whether the Eleventh Circuit Court of Appeals has decided an important issue of federal law which has not been, but should be, decided by this Court?

## TABLE OF CONTENTS

|  | Page |
|--|------|
| QUESTIONS PRESENTED FOR REVIEW .....         | i    |
| TABLE OF AUTHORITIES CITED .....             | iii  |
| STATEMENT OF THE CASE .....                  | 1    |
| SUMMARY OF THE ARGUMENT .....                | 12   |
| ARGUMENT AND CITATIONS OF<br>AUTHORITY ..... | 14   |
| CONCLUSION .....                             | 19   |

## TABLE OF AUTHORITIES

|  | Page(s)           |
|--|-------------------|
| <b>CASES</b>   |                   |
| <i>Butts v. City of New York</i> , 779 F.2d 141 (2d Cir. 1985) .....               | 12, 14, 15, 16    |
| <i>NAACP v. Stallings, et al.</i> , 829 F.2d 1547 (11th Cir. 1987) .....           | 12                |
| <i>Thornburg v. Gingles</i> , — U.S. —, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) ..... | 12, 13, 17, 18    |
| <br><b>CONSTITUTIONAL AND STATUTORY PROVISIONS</b>                                 |                   |
| U.S. Const., 1st Amendment .....   | 1                 |
| U.S. Const., 13th Amendment .....  | 1                 |
| U.S. Const., 14th Amendment .....  | 1                 |
| U.S. Const., 15th Amendment .....  | 1                 |
| Voting Rights Act Amendments of 1982,<br>Pub. L. No. 97-205, 96 Stat. 131 .....    | 13                |
| 28 U.S.C. 2284 .....   | 1                 |
| Voting Rights Act of 1965,<br>42 U.S.C. § 1973 .....                               | 1, 13, 15, 16, 17 |
| 42 U.S.C. § 1983 .....   | 1                 |
| Ga. Code § 21-2-501 (1983) .....   | 4                 |
| 1943 Georgia Laws 844 .....  | 4, 11             |
| 1951 Georgia Laws 3310 .....   | 11                |
| 1983 Georgia Laws 4656 .....   | 3, 4, 10          |
| Fed. R. Civ. P. 52(a) .....  | 2                 |
| Supreme Court Rule 17.1(a) .....   | 16                |



## **STATEMENT OF THE CASE**

### **A. Nature of the Case, Course of Proceedings, and Disposition in the Courts Below**

This action was originally filed on August 13, 1984, in the United States District Court for the Northern District of Georgia to require the City of Carrollton and Carroll County to abandon its at-large system for the election of the City Council and its sole commissioner form of government for the County Commission (R1-1). The complaint alleged that these election schemes not only had resulted in the inability of minorities to get elected to the Carrollton City Council or the Carroll County Commission, but had excluded or diluted black voting strength and had effectively denied black persons in Carroll County and the City of Carrollton equal access to the political process. This deprivation had thereby violated the provisions of the First, Thirteenth, Fourteenth and Fifteen Amendments of the Constitution of the United States and Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C., Secs. 1973 and 1983 (R1-1).

The Section 5 claims were heard by a three-judge court convened under authority of 28 U.S.C. 2284 which denied a temporary injunction by Order entered November 20, 1984 (R1-22). By Order entered January 17, 1985, Petitioners, Horrie Duncan, individually, and in his official capacity as Carroll County Commissioner; Patti Brown, A.G. Ault, Carol Martin, James Gamble and Tommy Greer, individually, and in their official capacities as members of the Carroll County Election Board, were

severed from defendants Mayor and Council of the City of Carrollton (R2-27). On October 16, 1985, the parties settled all claims against the City and a Notice of Dismissal was filed as to defendants Mayor and Council of the City of Carrollton (R3-71). Thereafter, the case proceeded only as to the County defendants.

The District Court conducted a nonjury trial on February 4-10, 1986. On April 29, 1986, the court issued an Order constituting the court's Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 52(a) (R4-99). The court found for the Petitioners on all claims, concluding that, by a preponderance of the evidence, it had not been established that "racial discrimination was [or is] a motivating factor for the present system." (R4-99-24). Respondents thereupon filed a timely Notice of Appeal to the Eleventh Circuit Court of Appeals.

On May 30, 1986, the Petitioners submitted a Bill of Costs to the District Court (R1-1-1). On June 16, 1986, Respondents moved to review the taxing of the costs and filed a brief in support of their motion (R1-2-1; R1-3-1). Petitioners' response to Respondents' brief was filed on July 3, 1986 (R1-7-1), and Respondents filed a supplemental brief on July 16, 1986 (R1-8-1). On August 8, 1986, the District Court entered an order denying the Respondents' motion to review costs but reduced the total bill by \$674.85 (R1-9-1.2). Respondents filed a Notice of Appeal on that decision on August 27, 1986 (R1-10). The appeal of the District Court's decision on the merits and its decision on Petitioners' request to tax costs against

Respondents was consolidated by Order of the Eleventh Circuit Court of Appeals on October 22, 1986.

Thereafter, the case was orally argued and a decision was rendered by the Eleventh Circuit Court of Appeals on October 19, 1987, reversing the decision by the District Court and remanding the case for further fact finding.

**B. Statement of Facts Relevant to Issues Presented for Review on Certiorari**

According to the 1980 census, Carroll County has a population of 56,346. Of this population, 9,679, or 17%, are black and 46,441 or 82%, are white (R5-100, 109, R6-146). There are 39,517 persons 18 years old or older in the county, 6,051 or 15.3% are black (R5-100). It can be inferred that black people constitute a minority of registered voters in Carroll County.

For the most part, the black population is concentrated in neighborhoods on the west side of the City of Carrollton (R6-80). Appellants are individual black adult citizens of the City of Carrollton and Carroll County and are representatives of two associations also named as Plaintiffs; the City of Carrollton Branch of the Voter Education Project (hereinafter VEP) and the City of Carrollton Branch of the National Association For the Advancement of Colored People (hereinafter N.A.A.C.P.) (R1-1-2).

Carroll County is governed by a single commissioner who is voted upon at-large by the voters of the entire county and serves for a term of four years. 1983 Georgia Laws 4656. A majority vote is required for the nomination and election of the County Commissioner. Ga. Code

Sec. 21-2-501 (1983). Prior to 1951, a three-man board of commissioners governed Carroll County. 1943 Georgia Laws 844.

The Carroll County Commissioner has and is vested with the exclusive jurisdiction and control over the following, among other things: to direct, control, convey, and care for all the property of the county according to law, to establish, alter, and abolish public roads, private roads, private ways, bridges and ferries according to law, to establish, abolish, or change election precincts and militia districts according to law, and to select and appoint all minor offices of the county whose election or appointment is not otherwise fixed by law. The County Commissioner also, and most importantly, is the sole legislative authority in the County and as such can pass county ordinances on his own motion. 1983 Georgia Laws 4656 at 4660.

Throughout the history of Carroll County, no black or minority candidate has run for County Commissioner successfully. The only black candidate who ran lost in 1976 (R5-179, R6-4). Although blacks have been elected to local office in the City of Carrollton and have recently been appointed to local boards and commissions, qualified black candidates who have sought election on a county-wide basis have been unsuccessful (R6-173-77, 187).

At the trial of the case, evidence of racially polarized voting in Carroll County was established by the Respondents' expert witness, Dr. Michael Binford, through the statistical analysis of vote returns. Dr. Binford testified that his analysis was based upon the record evidence consisting of a collection of voting returns, registration returns, and the examination of three election races involv-

ing black candidates; Jeff Long's race for County Commissioner in 1976; Narva Farris' race for sheriff in 1980; and Narva Farris' race for sheriff in 1984 (R5-88-89, 91, 111-113). Dr. Binford's conclusions, based on a correlation method of measuring polarizaton in voting, found that there were strong correlations, .75, .78, and .86, in each of the three races respectively (R5-90, 120-121). In addition, using the ecological regression method, Dr. Binford concluded that Mr. Long and Mr. Farris would receive a very low percentage of votes in an all white precinct and would receive a very substantial percentage of votes in an all black precinct (R5-90).

Dr. Binford also testified at trial concerning his statistical calculations of the R and  $R^2$  coefficients, and the findings he obtained as a result of his analysis of each of the three races identified above (R5-93-98, 118-122). Based upon his analysis of these races, Dr. Binford testified that there was "a substantial degree of racially polarized vote." (R5-122).

In addition to the three county-wide elections noted above, Dr. Binford also analyzed the results from each precinct in the 1984 presidential election with Jessie Jackson as a candidate. Dr. Binford found that the  $R^2$  figure was .91 and the correlation was .96 (R5-121). Dr. Binford concluded that there was, therefore, "a very strong relationship between the registration characteristics of the precincts and percentages of votes that he received." (R5-121).

The record evidence shows that Carroll County, in using the at-large system of election for a single commissioner, constitutes a district of 495 square miles (R4-99-3).

The county has a total population of 56,346 (R5-109). Dr. Willingham, a political science expert witness testified that it would be difficult for blacks to campaign for elective office (R7-153, 190, 217). The unusually large size of the district adversely impacts the ability of blacks to run and campaign since the costs of campaigning over such a large area are prohibitive to potential black candidates (R7-190, 217). A majority vote is required before any person can be elected commissioner of Carroll County. Ga. Code Sec. 21-2-501 (1983).

The record likewise presented evidence of election practices exacerbating the deficiencies in black participation. There was testimony at trial which indicated that the location of voter registration facilities intimidated blacks who consequently did not seek to register to vote due to such feelings of intimidation (R5-185, R6-64-65). Furthermore, there was testimony from Robert Springer, a Respondent, and deputy registrar in Carroll County, that black registrars had problems in assisting other blacks in voting (R6-216-217, R7-39). Mr. Springer and other witnesses testified that only after the initiation of this lawsuit were satellite registration sites established in the black community even though such sites had long been requested to be established in predominately black areas (R6-62, 214-215, R7-35-37). Prior to the setting up of the satellite registration sites, Mr. Springer related incidents involving difficulties in obtaining sufficient voter registration cards and use of a local library as a voter registration site (R6-213-214). The record evidence shows that black persons in Carroll County are still registered to vote in disproportionately low numbers in Carroll

County (R5-100). Over the years the practices and procedures encompassing the registration machinery in Carroll County has been used to preclude black access to the election process.

Mr. Jeff Long, a black candidate for county commissioner in 1976, testified that there were community-based forums sponsored by local groups, to which he was not invited (R5-180-181). Mr. Long also testified that unlike other candidates for office in Carroll County, he was prohibited from placing campaign literature in mailboxes without stamps (R5-181). Mr. Narva Farris, a black candidate for sheriff in 1980 and 1984, testified that he did not get the support from the influential, powerful people in Carroll County who supported candidates for office (R6-178-179). Moreover, Mr. Robert Springer testified that he felt the reason why Ms. Anne Shepard, a local black candidate to the City Council of Carrollton, was unsuccessful in her 1983 race for city council was that "the established group in Carrollton was not ready for a black council person" (R6-219).

Blacks in Carroll County are economically disadvantaged as compared to whites (R4-99-6). The 1980 census reveals that black families have a median income of \$11,168 (R6-153). Conversely, white families have a median income of \$17,118 (R6-153-155). Nine percent (9%) of white families in the county have incomes below the poverty level; whereas, thirty percent (30%) of black families live below the poverty level (R6-152-153). The record evidence further shows that blacks are more likely than whites to live in substandard housing and less likely to have a high school education (R6-147-152).

In addition, there was testimony at the trial regarding the effects of discrimination in employment for blacks in Carroll County. Testimony elicited at trial showed that upon integration, several black principals and coaches at formerly black schools were demoted to assistant principals and coaches (R2-74, R3-49-51). There has been a general reduction in the number of black teachers in the school system (R2-74, R3-49-51), and there are no blacks holding administrative positions in the school system (R2-74). Furthermore, the record evidence shows that while a disproportionately small number of blacks have worked in local government offices, the county has not hired blacks in numbers that are proportionate to their numbers in the general population (R3-64-67). The record evidence likewise shows that throughout the county there continues to be discrimination in employment against black persons (R3-71-72).

The record evidence supports the conclusion that the extent of past discrimination in such areas as education, employment and health has hindered the ability of blacks to participate effectively in the political process in Carroll County. While the extent of such discrimination has narrowed in recent years, the adverse effects on participation in the political process still exists.

The evidence indicates that there have been racial appeals in political campaigns in Carroll County. The District Court's conclusion to the contrary was clearly erroneous. Mr. Jeff Long, a black candidate for county commissioner in 1976, testified concerning a specific incident of a direct racial slur during his campaign (R5-186). Mr. Long stated that he had been informed by a colleague that

an opponent had stated to a public gathering that "if they didn't wake up they'd wind up the day after election with a nigger commissioner." (R5-186).

In addition, the testimony at the trial of the case showed that black voters were intimidated in registering to vote at the courthouse and other voter registration sites then in existence (R5-185, 186, R6-64-65).

The record establishes that in the present case no black person has ever been elected to the office of Carroll County Commissioner (R4-99-9). No black person has ever been elected to a county-wide position in Carroll County. Jeff Long, a Respondent and a black adult citizen of Carroll County, ran unsuccessfully for County Commissioner in 1976 (R5-186, 199). Mr. Long testified that despite his efforts in waging a strong campaign, he was unable to win election to the single commissioner seat under the present election system (R5-186-188).

Likewise, Narva Farris, a black adult citizen of Carroll County, ran unsuccessfully for sheriff twice, once in 1980 and again in 1984 (R6-167). Mr. Farris, too, testified that he, despite his qualifications, past experience, and hard campaigning, was unable to win the office of sheriff (R6-173-177, 187).

The record is replete with examples of the unresponsiveness of Carroll County public officials to the needs of the black community. One example of the gross unresponsiveness is in the area of government hiring and board appointments. While the office of commissioner is only directly responsible for hiring from about six to eight employees, Mr. Duncan, the former four term commissioner, admitted that during his 16 year administration

no blacks were hired for these positions (R5-60). Moreover, there was no affirmative action hiring policy for the county (R5-59). Indeed, in exercising his power "in selecting and appointing all minor officers of the county whose election or appointment is not otherwise fixed by law," 1983 Georgia Laws 4657 at 4660, only one black was ever appointed to a county board position during the 16 years Horrie Duncan was county commissioner (R5-192).

The record reveals a strong showing of functional unresponsiveness in Carroll County government. Mr. Duncan indicated in his testimony at trial that while the county received federal grant funds and revenue sharing funds, little, if any, of the money was used to provide housing, health care, paved roads, water services or other much needed areas of public service to the predominately black areas of Carroll County (R5-33-35, 64-65, 67). Nor were any surplus county funds used for these purposes during Horrie Duncan's long-standing term in office (R5-68).

The District Court characterized the failure to pave roads as a result of "fiscal restraint" (R4-99-12). The record more accurately reflects, however, that certain roads were not paved because the county reportedly miscalculated the funds needed to pave roads without accounting for inflation and used grant funds for purposes other than originally designated in federal grant applications (R5-32, 34, 38-42). The District Court acknowledged that the policy on road paving was unclear (R4-99-11, 12).

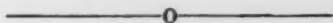
The evidence of record supports the conclusion that the policy underlying the sole commissioner form of government in Carroll County is tenuous. Carroll County has

been governed by a one-man commission since 1951. 1951 Ga. Laws 3310. During 1968 to 1984, Respondent Horrie Duncan occupied the office of commissioner (R5-22). While the present commissioner, Tracey Teal, testified that, in his opinion, a single commissioner form of government is more efficient and accountable to the residents of the county (R8-97), the record shows that this form of government has in fact been run in a haphazard and inefficient manner. Mr. Duncan admitted that no formalized meetings were held when he was in office and those that were held were not regularly advertised (R5-62-63). The office was inefficient in that surplus funds were kept in the county budget while numerous public services went unprovided, especially in predominately black areas of the county (R5-67-68, R8-108).

Prior to 1951, Carroll County had been governed by a three-man commission. 1943 Georgia Laws 844. In 1947 Willis Smith, a State Representative from Carroll County, introduced in the legislature a bill to establish a one-person commission in Carroll County. This bill was subject to a referendum of voters in the county but was not enacted until reintroduced in 1951. The one-person commission became effective in 1953.

Inferential evidence that the 1951 bill which created the one-person commission was imbued with a racially discriminatory purpose is the fact that Willis Smith, the representative who initially introduced the legislation in 1947, also made a speech during that same term of the legislature urging his fellow representatives to support passage of the white primary bill which prohibited blacks from voting in primary elections. In support of this bill Rep-

representative Smith stated "Georgia is in trouble with the Negroes unless the bill is passed. This is a white man's country and we must keep it that way."



### SUMMARY OF ARGUMENT

The primary consideration Petitioners urge upon this court as justification for this court to grant a writ of certiorari is that the decision of the Eleventh Circuit below is in conflict with the decision of the Second Circuit in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985). The claim by Petitioners that the ruling in *Butts* creates a conflict between the decisions of two Circuit Courts of Appeal is wholly misplaced. The court in *Butts* explicitly stated that its holding did not reach the issue of whether and how Section 2 of the Voting Rights Act applied to single-member offices. The court stated that its holding was limited to whether the State of New York run-off election requirement denied any class of voter an opportunity for equal representation in elections for the mayorship of New York City. There is no conflict between the circuits as to application of Section 2 to single-member offices.

In ruling as it did in the case below, the Eleventh Circuit followed the most recent and authoritative rulings of this court. *Thomburg v. Gingles*, — U.S. —, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), provided the substantive framework upon which the Eleventh Circuit crafted its holding in *NAACP v. Stallings, et al.*, 829 F.2d 1547 (11th Cir. 1987). *Gingles* is the only holding by this court on the

Voting Rights Act of 1965, since the 1982 amendments to the Act. The Eleventh Circuit was quite appropriate in utilizing the substantive law of *Gingles* upon which to fashion its opinion. There was no departure by the Eleventh Circuit from the accepted and usual course of judicial proceedings in deciding the case below.

The relative importance of the Eleventh Circuit's opinion within the context of this Court's role in supervising the federal judiciary on questions of important federal law is very low. The Eleventh Circuit's decision has no import outside the 24 or so counties out of 159 counties within the State of Georgia who have authorized the peculiar form of government known as the sole commissioner form of government. This form of government is non-existent to any other state in the union.

Since the sole commissioner office holder is empowered with legislative, executive and some judicial powers, any decision with respect to the application of Section 2 of the Voting Rights Act to this office is clearly distinguishable from, and of no import, to purely executive single office holders such as those of governor, district attorney, or other single-member office. Therefore, the opinion of the Eleventh Circuit does not involve an important issue of federal law which has not been but should be decided by this court.

**ARGUMENT****I.****1. THERE IS NO CONFLICT BETWEEN THE  
OPINION BELOW AND THE OPINION OF  
THE SECOND CIRCUIT IN BUTTS v. CITY  
OF NEW YORK, 779 F.2d 141 (2D CIR. 1985)**

The decision of the Second Circuit Court of Appeals in *Butts v. City of New York*, 779 F.2d 141 (1985) is in no respect in conflict with the decision of the Eleventh Circuit below. The issue presented in *Butts* was whether a New York statute, which required a run-off election in a city primary if no party candidate received more than 40% of the vote, was violative of the Constitution and the Voting Rights Act. In upholding the statute the court found that there was no racially discriminatory purpose in the enactment and maintenance of the law by the State of New York. The court also found that, as to the Voting Rights Act claim, there was no discriminatory effect on racial minorities since it was undisputed that the run-off law had not had any actual discriminating effect since the only minority candidate to whom it had applied had actually been given a second chance to win the mayoralty nomination by virtue of the law. *Id.* at 145, note 5.

The issue in *Butts* in no way involved the question of at-large voting and its dilutive effect on equal minority participation in the electoral process. While the court did by way of dicta speak to the application of Section 2 to a single member office it did so only obliquely and not in the context of the facts *sub judice*. The Court in *Butts* hypothesized as follows:

"Of course, it is possible to deny minority members an equal voice in filling a single-member office; this could occur, for example, if the office were chosen by a convention of delegates or a council of office-holders that had been selected on a basis that denied class members an equal opportunity to secure representation in the convention or council. But so long as the winner of an election for a single-member office is chosen directly by the votes of all eligible voters, it is unlikely that electoral arrangements for such an election can deny a class an equal opportunity for representation. *We need not determine whether such opportunity could ever be denied in the context of an election to a single-member office. It suffices to rule in this case that a run-off election requirement in such an election does not deny any class an opportunity for equal representation and therefore cannot violate the Act.*" 779 F.2d 141, at 149. (Emphasis added)

Respondents would also add that even if *Butts* had involved the application of Section 2 of the Voting Rights Act to the at-large feature of an electoral arrangement for the election of a single-member office the same results might permissibly have been called for given the nature of the office involved. That is, where the single-member office is essentially executive in nature, as was the case in *Butts*, which involved the mayoralty of the City of New York, as opposed to legislative or both legislative and executive, as is the case with the single commissioner form of government in Carroll County, different statutory and constitutional considerations might very well apply given the constitutional dimensions of our tricameral form of government on both the federal and state levels. Likewise there is a strong constitutional foundation for multi-member geographical representation in the legislative branch of both the federal and state levels of government. There-

fore, where a single-member office has sole power to perform both legislative and executive responsibilities, inquiry must be made as to the tenuousness or lack thereof, of such an electoral arrangement in light of the strong constitutional preference for multi-member geographical representation in the legislative branch of government. Respondents would argue that even more scrutiny is warranted for such an electoral format where there is actual discriminatory effect precluding equal minority participation in both the legislative and executive branches of government.

In any event, the issue of whether Section 2 of the Voting Rights Act applies to a single-member office was never decided in *Butts v. City of New York*, *supra*, consequently, there is no conflict between the decision below of the Eleventh Circuit and the decision in *Butts*.

**2. THE ELEVENTH CIRCUIT COURT OF APPEALS DID NOT SO FAR DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN DECIDING THE CASE BELOW SO AS TO CALL FOR AND EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

Whether a circuit court of appeals so far departed from the accepted and usual course of judicial proceedings in deciding the case below so as to call for an exercise of this Court's power of supervision is a consideration this Court must address in determining whether to grant a writ of certiorari. Supreme Court Rule 17.1(a).

It can hardly be said that the Eleventh Circuit did anything but apply the relevant statutory and decisional

law to the facts of this case. In fact the court based its decision on the only case which this court has decided under Section 2 of the Voting Rights Act of 1965, as amended June 29, 1982. *See, Thornberg v. Gingles*, — U.S. —, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

*Gingles* was, and is, an exhaustive analysis and synthesis of all relevant Section 2 cases both pre and post the 1982 amendments to Section 2 of the Act. It is without dispute a rendition of the most definitive state of the law on application of Section 2 of the Act to at-large electoral formats which are challenged on the basis of minority vote dilution.

The Eleventh Circuit applied the substantive holding of *Gingles* to the facts of this case without error or deviation. Therefore, it cannot be contended that the circuit court so far departed from the accepted and usual course of judicial proceedings, in deciding the case below, as to call for an exercise of this court's power of supervision.

**2. WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.**

In light of this court's decision in *Gingles*, it cannot be seriously contended that the Eleventh Circuit's decision below has decided an important issue of federal law which heretofore had never been or should be decided by this Court. The *Gingles* decision, throughout its 44 pages of the Supreme Court Reporter, addresses almost all, if not all, of the substantive issues presented in this case. Moreover, those issues, if any, that it does not directly address

can easily be resolved by application of the holding in *Gingles*.

This is exactly what the Eleventh Circuit did in its opinion in the case below. It applied the same tests *Gingles* sanctioned in validating or invalidating multi-member electoral formats to single-member electoral devices. The same factors *Gingles* recognized as dispositive in multi-member challenges, i.e., (1) existence of a racial bloc voting majority, (2) a geographically compact minority group claiming dilution of its vote, and (3) the existence of political cohesiveness within the minority group, are equally as dispositive within the context of a Section 2 violation on single-member offices.

In addition, the ultimate impact of the Eleventh Circuit decision is extremely limited. The State of Georgia is the only state in the union that has the sole commissioner form of local government. Within the State of Georgia only 24 of its 159 counties maintain this form of government and in the majority of those counties the population is so overwhelmingly consistent of the majority population that they could not be held to be dilutive of minority voting strength. Therefore grant of a writ of certiorari to review the Eleventh Circuit's opinion would not be provident.

## CONCLUSION

Respondents urge this Honorable Court to deny Petitioners' petition for a writ of certiorari. There is no conflict between the opinions of the Circuits that would authorize such a writ. Nor did the court below so deviate from accepted judicial proceedings so as to warrant invocation of this court's power of supervision. The opinion of the Eleventh Circuit is limited to a small number of local governments in one state of the union. The decision of the Eleventh Circuit involves no important questions of federal law which have not already been addressed by this court or which should be addressed by this court. For the above and foregoing reasons Respondents urge this Honorable Court not to grant a Writ of Certiorari.

Respectfully submitted,

KENDALL & KENDALL

By: WAYNE B. KENDALL  
Georgia State Bar No. 414076  
*Attorney for Respondents*

Please serve:

WAYNE B. KENDALL  
KENDALL & KENDALL  
Attorneys at Law  
134 Peachtree Street  
Suite 1105  
Atlanta, Georgia 30303  
(404) 584-7416